SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-116

DIANE M. PLACE,

Petitioner,

v.

CASPAR WEINBERGER, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

JACK GREENBERG
JAMES M. NABRIT, III
BARRY GOLDSTEIN
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

IRVING STAHL
JAMES P. GREGORY
1850 Guardian Building
Detroit, Michigan 48226

Counsel for Petitioner

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PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order vacating its denial of the Petition for Writ of Certiorari, entered on November 25, 1974, and granting the petition. This petition for a rehearing is founded upon the decision of the Second Circuit Court of Appeals in *Brown* v. *General Services Administration* (No. 73-2628) (November 21, 1974), pp. 1a-17a, Petition For Writ of Certiorari filed December , 1974, No. 74- .[1]

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[1] Counsel were notified by telephone of the decision in *Brown* in the late afternoon of Thursday, November 21, 1974, and obtained a copy of the decision in the afternoon of Friday, November 22, 1974. The instant Petition For Writ of Certiorari was considered at the conference of Friday, November 22, 1974, the result of which was announced on Monday, November 25, 1974. Under the circumstances Petitioner, of course, had no opportunity to bring this development to the attention of the Court prior to the denial of Certiorari.

The instant case presents the question, *inter alia,* whether the new remedies of section 717 of the 1964 Civil Rights Act, as amended, apply to discrimination occurring prior to March 24, 1972, the date on which that section became law. Section 717, 42 U.S.C. § 2000e-16, authorizes the district courts to provide to federal employees aggrieved by discrimination on the basis of race or sex the same remedies available to employees of private employers. There is a conflict among the courts of appeals on this question; three circuits have concluded that section 717 is applicable to discrimination occurring before March 24, 1972, and one circuit, in the instant case, has concluded that it is not. On November 25, 1974, this Court denied the Petition For Writ of Certiorari, Justices Stewart, White and Douglas voting to grant the writ. Whenever a federal employee has sought to assert federal jurisdiction under section 717 to remedy such discrimination, the government, in three circuits and at least twenty-four district courts, including the instant case, has opposed judicial scrutiny of such claims of discrimination by arguing that section 717 *does not* apply to discrimination occurring before March 24, 1972.

In *Brown* v. *General Services Administration* the government successfully advanced the opposite contention in preventing judicial scrutiny of Mr. Brown's claims; in the Second Circuit the government contended that section 717 *does* apply to discrimination occurring before March 24, 1972. The government there urged that section 717 had repealed a variety of statutes on which plaintiff founded his cause of action. Since the discrimination of which plaintiff complained had occurred prior to March 24, 1972, the government argued that section 717, and thus the repeal, applied to such discrimination occurring before the effective date of the section 717.

The Second Circuit, in holding at the instance of the government that section 717 applied to discrimination before its effective date, expressly rejected the contrary conclusion reached by the Sixth Circuit, also at the urging of the government, in this very case.

> In light of *Bradley*, we cannot agree with the Sixth Circuit's holding in *Place* v. *Weinberger, supra,* that Congress by its silence as to all sections of the Act except one intended the other sections to have prospective application only.[2]

At oral argument in *Brown,* the government expressly relied on *Koger* v. *Ball,* 497 F.2d 702 (4th Cir. 1974) and urged that this Court's decision in *Bradley* v. *School Board of the City of Richmond,* 40 L.Ed 2d 476 (1974), dictated that section 717 be applied to discrimination occurring prior to March 24, 1974. In the instant case petitioner advanced the identical argument[3] but the government refused to acknowledge its correctness.

That the government advanced inconsistent positions in these two cases was not the result of inadvertence. In *Brown* the government, in stating its assumption that section 717 applied to discrimination occurring before March 24, 1972, conceded the government "has argued differently" in other cases.[4] The Solicitor General was also made aware of the inconsistent position being taken by the government in different circuits.[5] Had the Solicitor General, in response to the Petition in this case, taken a definitive position as to whether or not the government maintained the decision of the Sixth Circuit was correct,

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[2] P. 11a.

[3] Petition for Writ of Certiorari, No. 74-116, pp. 17-19.

[4] Brief for Defendants-Appellees No. 73-2628, 2d Cir., p. 6 n.

[5] See Petition for Writ of Certiorari, p. 19.

uniformity in the position of the government in other case might have resulted. Instead, the Solicitor opposed Certiorari solely on the ground that the decision below was unimportant, thus avoiding committing the government to one position or the other.[6]

It has long been a precept of Anglo-Saxon jurisprudence, at least since Lord Mansfield's opinion in *Montefiori* v. *Montefiori*, 25 K.B. 203 (1762), that a party must not be permitted to advance inconsistent positions in judicial proceedings. See, e.g. Story's Equity Jurisprudence, 14th ed., § 2020.[7] The rule prevents a party from encouraging the growth of conflicts among the courts by seeking to win two inconsistent decisions where consistency would preclude him from winning more than one. "Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts will not tolerate. . . . And this is more than an affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Scarano* v. *Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953).

This Court has applied that principle in a variety of cases. In *Callanan Road Co.* v. *United States*, 345 U.S. 507 (1953), this Court refused to permit the holder of a certificate of convenience and necessity to collaterally attack the provisions of its certificate. The Court noted that, in obtaining its certificate, the holder had earlier

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[6] Memorandum for the Respondents in Opposition, pp. 2-4.

[7] See also 1B Moore's Federal Practice, ¶ 0.405[8]; Note, 59 Harv. L.Rev. 1132 (1946); Note, "Estoppel Against Inconsistent Positions in Judicial Proceedings", 9 Brooklyn L. Rev. 245 (1940); Note, 1 Tenn. L.Rev. 1 (1922). The principle was expressed by Lord Kenyon in the maxim, "*Allegans contraria non est audiendus*".

argued before the Interstate Commerce Commission that the provisions of such certificates were not subject to collateral attack. This Court held that "[t]he appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval." 345 U.S. at 513. In *Davis* v. *Wakelee,* 156 U.S. 680 (1895), Wakelee had obtained a final state court judgment against Davis on certain notes following service by publication. When Wakelee sought to assert the underlying claim in a bankruptcy action, the bankrupt Davis successfully argued that Wakelee need not, and thus could not, do so since the claim had already been reduced to a valid final judgment and was not dischargeable. Thereafter Davis moved to set aside the original judgment on the ground that service by publication was unconstitutional, relying on *Pennoyer* v. *Neff,* 95 U.S. 714 (1878). This Court forbade Davis from maintaining such an inconsistent position as to the legality of service and the validity of the resulting judgment. 156 U.S. at 689-691.[8] See also *Philadelphia R.R. Co.* v. *Howard,* 54 U.S. (14 How) 307 (1851), *Ohio R.R. Co.* v. *McCarthy,* 96 U.S. 258 (1878).

These principles apply *a fortiori* when the party seeking to advance inconsistent positions is the government. A private party has an interest in winning an action regardless of the arguments or maneuvers it may use. The government's overriding interest is that justice should be

[8] "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment, claim it was rendered without personal service upon him."

done; so long as that occurs the government has won, regardless of whether a particular defendant goes free or a civil litigant obtains injunctive or monetary relief. *Berger* v. *United States*, 295 U.S. 78, 88 (1935). Six circuits considering this question have all held that the government may not advance inconsistent positions.[9] As the Second Circuit pointed out in *Staten Island Hygeia Ice Co.* v. *United States*, 85 F.2d 68, 72 (1936), "[t]here is nothing in the nature of sovereignty or in the recognized prerogatives of the sovereign that would allow the government to take and keep a right without the accompanying burden".

The due administration of justice would be materially advanced by requiring the Solicitor General to respond to this Petition For Rehearing and to state definitively whether the government maintains that section 717 does or does not apply to discrimination occurring prior to March 24, 1974. If the Solicitor General adheres to the government's position in *Brown*, the instant case can be summarily reversed.[10] If the Solicitor General adheres to the government's position in the Sixth Circuit, the issues presented by the pending Petition for Writ of Certiorari in *Brown* will be substantially simplified, and the necessity for a grant of certiorari in the instant case, in view of the new and conflicting decision of yet another court

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[9] *Goodman* v. *Public Service Commission*, 467 F.2d 275 (D.C. Cir. 1972); *United States* v. *Fox Lake State Bank*, 366 F.2d 962, 965-66 (7th Cir. 1966); *Vestal* v. *C.I.R.*, 152 F.2d 132 (D.C.Cir. 1945); *Eichelberger & Co.* v. *C.I.R.*, 88 F.2d 874 (5th Cir. 1937); *United States* v. *Brown*, 86 F.2d 798 (6th Cir. 1936); *Staten Island Hygeia Ice Co.* v. *United States*, 85 F.2d 68 (2d Cir. 1936); *United States* v. *Denver, etc., R.R.*, 16 F.2d 374, 376 (8th Cir. 1926).

[10] See, regarding the effect of such confessions of error *Urrutia* v. *United States*, 357 U.S. 577 (1958); *Howard* v. *United States*, 356 U.S. 25 (1958).

of appeals, will be manifest. Compare *Sanitary Refrigerator Co.* v. *Winters,* 280 U.S. 30, 34 n. (1929). Directing the Solicitor General to submit such a response is the most expeditious manner of precluding the government from continuing to advance different positions in different courts of appeal.

The inconsistent positions taken by the respondents doubtless reflect a good faith belief by the Department of Justice that it would be extremely undesirable to permit inquiry into claims that federal officials are breaking the law by discriminating on the basis of race or sex. But the national policy in this regard is to be made, not by lawyers in the executive branch, but by Congress. It was Congress which prohibited such discrimination in 1957. And it was Congress which, over the objections of the executive branch, mandated such judicial scrutiny in 1972. The issue presented by this case is the extent to which attorneys within the Department of Justice can thwart or delay implementation of congressional policy by asserting whichever of two inconsistent theories will, in any particular case, prevent aggrieved employees from obtaining a judicial remedy. It is the very essence of a government of laws that there should be, in a case such as this, but one rule, uniform and invariable, applied to all citizens, regardless of whether, in some instances, the result of that application may be displeasing to the men who chance to hold public office. *United States* v. *United Mine Workers,* 330 U.S. 258, 307-08 (1947) (Frankfurter, J. concurring). The ultimate responsibility for vindicating that principle is imposed by the Constitution on this Court.

CONCLUSION

For the above reasons, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court direct the Solicitor General to respond to this Petition for Rehearing, and that the Court thereafter grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
BARRY GOLDSTEIN
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

IRVING STAHL
JAMES P. GREGORY
1850 Guardian Building
Detroit, Michigan 48226

Counsel for Petitioner

Certificate of Counsel

As counsel for petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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Counsel for Petitioner